IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

KEURIG, INCORPORATED,)
Plaintiff,)
v.) C.A. No. 07-17 (GMS)
KRAFT FOODS GLOBAL, INC.,) JURY TRIAL DEMANDED
TASSIMO CORPORATION, and KRAFT FOODS INC.,) PUBLIC VERSION
Defendants.)

LETTER TO THE HONORABLE GREGORY M. SLEET FROM DAVID E. MOORE ESQUIRE DATED APRIL 9, 2008

Richard L. Horwitz (#2246) David E. Moore (#3983)

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Attorneys for Defendants Kraft Foods Global, Inc., Tassimo Corporation, and Kraft Foods Inc.

cc:

Clerk of Court

Counsel of Record



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April 9, 2008 Public Version Dated April 16, 2008

VIA ELECTRONIC FILING

The Honorable Gregory M. Sleet J. Caleb Boggs Federal Building 844 King Street Wilmington, DE 19801 PUBLIC VERSION

Re: Keurig Incorporated v. Kraft Global, Inc. et al. C.A. No. 07-17-GMS

Dear Chief Judge Sleet:

Pursuant to the Court's Correcting Entry of April 1, 2008 and the Scheduling Order in this case, Kraft Foods Global, Inc., Tassimo Corporation and Kraft Foods Inc. ("Kraft Defendants") request permission to file a motion for summary judgment that all of the asserted claims of the patent-in-suit, U.S. Patent No. 6,607,762 ("'762 Patent"), are invalid or not infringed. Favorable action on the Kraft Defendants' motion for summary judgment would be dispositive of all of Keurig's claims against the Kraft Defendants.¹

Keurig asserts that claims 1, 2, 8, 9 and 10 of the '762 Patent are infringed. As detailed below, Kenco Singles Cartridges which embody all of the elements of claims 1, 2, and 9 were in public use more than a year prior to the filing of the application for the '762 Patent. Thus, claims 1, 2 and 9 are invalid pursuant to 35 U.S.C.§102(b).²

Claims 8 and 10 require that the container be impermeable to liquids and gases.

On April 8, 2008, the Kraft Defendants filed a motion for leave to amend their answers and counterclaims (D.I. 81) to add allegations of inequitable conduct. If their motion is granted, that counterclaim would remain.

² There are two prior art patents that anticipate the asserted claims of the '762 Patent or make obvious the asserted claims. However, in order to keep the Kraft Defendants' motion for summary judgment very simple, the Kraft Defendants will only rely upon public use of the Kenco Singles Cartridge before the Critical Date of the '762 Patent in their motion for summary judgment.

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Nevertheless,

Keurig seemingly contends that oxygen permeation of the T-Disc is at a commercially acceptable level and thus it is "impermeable" as that term is used in the '762 Patent. The evidence of record also shows that the Kenco Singles Cartridge is less permeable to oxygen than the T-Disc. Thus, either the T-Disc does not infringe claims 8 and 10, or to the extent the T-Disc is deemed to be "impermeable", the Kenco Singles Cartridge is likewise impermeable and claims 8 and 10 also are invalid pursuant to Section 102(b).

Pursuant to the Court's Scheduling Order, early in this case the Kraft Defendants served upon Keurig invalidity charts, which demonstrated that each element of the asserted claims was present in the Kenco Singles Cartridge. Keurig in turn served upon the Kraft Defendants its refutation to these invalidity contentions. Keurig's only assertion as to why the Kenco Singles Cartridge did not anticipate the asserted claims was that it did not include a single lid that is both (1) piercable to accommodate an inflow of liquid into the first chamber for infusion with a beverage medium to produce a beverage; and (2) piercable to accommodate an outflow of a beverage from a second chamber to the exterior of the cartridge. Keurig also stated that it did not concede that the Kenco Singles Cartridge was in public use.

Keurig's assertions placed into dispute the meaning of the claim terms "piercable to accommodate an inflow of liquid" and "piercable to accommodate an outflow of the beverage". In its claim construction order the Court construed "piercable to accommodate an inflow of liquid" as meaning "capable of being pierced to permit a flow of liquid into" and "piercable to accommodate an outflow of the beverage" as meaning "capable of being pierced to permit a beverage to flow out."

Thus, the issue with regard to the Kraft Defendants' Section 102(b) "in public use" invalidity defenses boils down to whether the Kenco Singles Cartridge was "in public use" more than a year prior to the filing of the application for the '762 Patent, and if so, whether it had a lid having a first section overlying the first chamber and a second section overlying the second chamber, the first section being *capable* of being pierced to permit an inflow of liquid into the first chamber and the second section being *capable* of being pierced to permit an outflow of beverage from the container.

THE LAW

Whether a patent is invalid for public use is a question of law based on underlying facts. An invention is in public use if its is shown to or used by an individual other than the inventor under no limitation, restriction, or obligation of confidentiality. *Am. Seating Co. v. USSC Group, Inc.*, 514 F.3d 1262, 1267 (Fed. Cir. 2008). A single use of an article embodying the invention is sufficient to constitute "in public use". It is not necessary that the article be used or sold for profit. Nor is it necessary that the article be used with the knowledge or consent of the inventor. The invention need not necessarily be exposed to public view. Its presence may not be known to the user of the article. *Fisher-Price, Inc. v. Safety 1st, Inc.*, 279 F. Supp. 2d 530, 544 (D. Del. 2003).

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UNDERLYING FACTS

a. <u>Kenco Singles Cartridges Were In Public Use More Than A Year Prior To The</u>
Critical Date

For purposes of their motion for summary judgment, the Kraft Defendants will use the earliest possible Critical Date, February 18, 2000, the date of filing of the provisional application from which the '762 Patent claims priority.

The evidence of record establishes that during the period from at least November 1996 through 1998³, Helen Glus used Kenco Medium Roast Singles Cartridges at least three times a day at her place of work, Philip Morris Companies, Inc., in New York City. Glus Dep. (Ex. B) 11-15. She was not under an obligation of confidentiality or secrecy to anybody with regard to the Kenco Singles Cartridges. Id. at 15-17. The Kenco Singles machine and Kenco Singles Cartridges that she used were in the kitchen on her floor. They were freely accessible to Ms. Glus, to her co-workers on her floor, as well as to employees from other floors and visitors to the building. Id. at 12-15, 73-74. Ms. Glus saw her co-workers and visitors use the Kenco Singles Cartridges. Id. at 14-15. Ms. Glus' deposition testimony is corroborated by documentary evidence, which were made exhibits at her deposition. Ms. Glus was responsible for ordering Kenco Singles Cartridges when the supply ran low. Her files include facsimiles in which she ordered Kenco Singles Cartridges; return facsimiles acknowledging receipt of the request, facsimiles stating that the requested Kenco Singles Cartridges had been dispatched, invoices for the dispatched Kenco Singles Cartridges and shipping documents for the dispatched Kenco Singles Cartridges. For instance, in one of her facsimiles she wrote "the machine is a BIG So much so, that we're ready to re-order certain items after such a short time. [including Medium Roast]" Defs.' Exhibit 50 (Ex. C). Three months after that facsimile she sent another facsimile stating "It's that time again. May I place the following order: [including Medium Roast]." Defs.' Exhibit 52 (Ex. D).

Keurig's counsel cross-examined Ms. Glus regarding the facts and circumstances of her use of the Kenco Medium Roast Singles Cartridges. The facts are not in dispute. Whether Ms. Glus' use of Kenco Singles Cartridges constitutes "in public use" is a purely a legal question.

b. <u>Kenco Singles Cartridges In Public Use Embodied All Of The Elements Of Claims</u> 1, 2 and 9

It is beyond dispute that in the November 1996 through December 1998 time period the Kenco Singles Cartridges had a single foil lid that had a first section overlying the first chamber in which the beverage medium was stored and a second section overlying the second chamber from which the beverage exited the container. It is also beyond dispute that the section of the lid

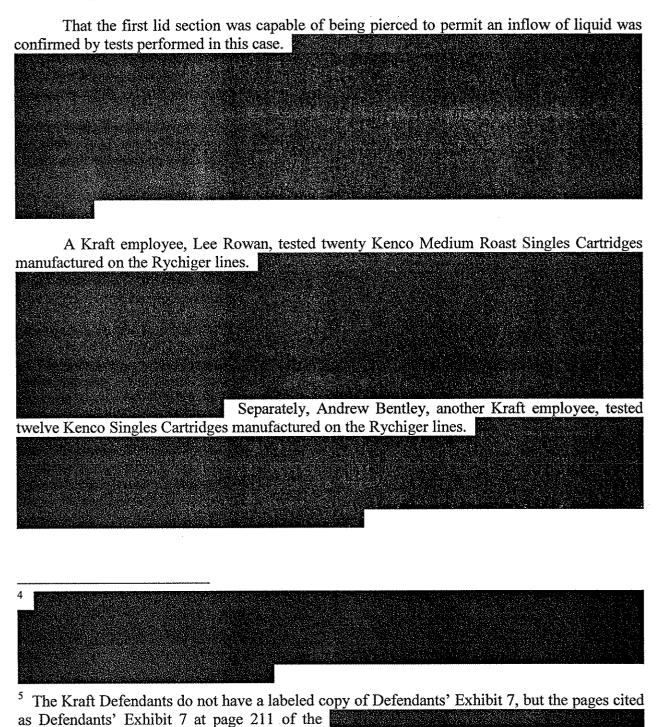
At her deposition Ms. Glus testified that she began using Kenco Singles Cartridges in December 1995 and used them into 1999. Glus Dep. (Ex. B) 6-11. But to simplify their motion for summary judgment, the Kraft Defendants will rely upon her use during the period from November 1996 through December 1998.

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overlying the second chamber was capable of being pierced to permit an outflow of liquid and was pierced in use with a Kenco Singles brewer. Thus, the first lid section, which was made of the same material as the second lid section, was likewise capable of being pierced to allow an inflow of liquid.



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c. Dependent Claim 2

Dependent claim 2 adds that the lid has less resistance to being pierced as compared to the resistance to being pierced of the outer container. It is self evident that the foil lid of the Kenco Singles Cartridge is less resistant to piercing than the hard plastic container.

d. Dependent Claim 9

Dependent claim 9 adds that the lid is impermeable to liquids and gases. The documentary evidence of record shows that the lid of the Kenco Singles Cartridge has less than a detectable level of permeability to oxygen. Pl's Exhibit 72 (Ex. G). This is considered impermeable.

If Keurig were to now argue that the lid of the Kenco Singles Cartridge is not impermeable, then it would have to concede that the lid of the accused T-Disc is likewise not impermeable, and thus does not

infringe.

e. Dependent Claim 8 and Independent Claim 10

Dependent claim 8 and independent claim 10 require that the outer container be impermeable to liquids and gases.

Either the

container of the T-Disc is not "impermeable" and does not infringe Claims 8 and 10, or the Kenco Singles Cartridge is "impermeable" and Claims 8 and 10 are also invalid on Section 102(b) grounds.

CONCLUSION

The issue of whether the asserted claims are invalid on the basis of Section 102(b) "in public use" is ripe for summary judgment. The factual record in this regard was fully developed in discovery, including the evidence specified above. The Kraft Defendants request the Court to make a legal determination based upon the underlying facts. By ruling on this legal issue the Court can efficiently dispose of this case.

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Respectfully,

/s/ David E. Moore

David E. Moore

DEM:nmt/860495/31118 Enclosures

cc: Clerk of Court (Via Hand Delivery)

Counsel of Record (Via Electronic Mail)

EXHIBIT A

KENCO MEDIUM ROAST SINGLES CAPSULE (Original provided to Court)



EXHIBIT B

NITED STATES DISTRICT COURT
OR THE DISTRICT OF DELAWARE
X
EURIG, INC.,
Plaintiff, - against -
RAFT FOODS GLOBAL, TASSIMO CORPORATION,
RAFT FOODS INTERNATIONAL,
• • • • • • • • • • • • • • • • • • •
Defendants.
.A. NO. 07-17 GMS
X
100 -
120 Park Avenue
New York, New York
March 4, 2008
2:00 P.M.
Examination Before Trial of HELEN GLUS
ursuant to Notice, taken by and before Renee
. Harris, a Notary Public and Shorthand
eporter of the State of New York.
ETTEN CONTED COTTON DEDODUTNO CO TTO
ELLEN GRAUER COURT REPORTING CO. LLC 126 East 56th Street, Fifth Floor
TAO BOST SOUR STEEL, ETITIE ETOOF
New York, New York 10022
New York, New York 10022 212-750-6434

Page 6 H E L E N G L U S, having first been duly 1 2 sworn by a Notary Public for and within the 3 State of New York, upon being examined, testified as follows: 4 5 6 EXAMINATION BY 7 MR. SCHLITZ: 8 Please state your name for the 0. 9 record. 10 Helen Glus. 123 Mamaroneck Avenue, Α. 11 Mamaroneck, New York, 10543. 12 I'm going to have to ask you to 13 speak up a little bit so we can all hear. Mrs. Glus, who do you currently work 14 15 for? 16 Louis Camilleri, chairman and CEO of 17 Altria Group, Inc. 18 Did you ever work for Kraft Foods? 0. 19 Yes, the international division. Α. 20 Okay. And can you tell me the dates Q. 21 that you worked for Kraft Foods? 22 Mr. Camilleri was transferred there Α. 23 on December '95, and we stayed there till 24 August '96. 25 And you say "there"; where is there? 0.

Page 7 1 GLUS 2 The Rye Brook office of Kraft Foods Α. 3 International. 4 Q. And is that in New York State? 5 Α. Westchester. Westchester, New York State? 6 Ο. Α. 7 Mm-hmm. And when you arrived at the offices 8 0. 9 of Kraft Foods International Rye Brook, was 10 there a single-serve beverage machine there? 11 Α. Yes, there was. 12 0. Do you know what brand it was? 13 Α. We referred to it as the Kenco 14 machine. 15 Where was the Kenco machine that 0. 16 you're referring to, where was that in the 17 building? 18 On the seventh -- on my half of the Α. 19 seventh floor in the kitchen. 20 Q. Who had access to that machine? 21 Α., Everyone. 22 Everyone, meaning? 0. 23 Α. Everyone who worked on that floor 24 who came to that floor, visited that floor. 25 Now did you personally have access Q.

Page 8 1 GLUS 2 to it? 3 . A. Yes. We've talked about there was a Kenco Q. singles machine. Were there capsules for use 5 6 with the Kenco singles machine at the same 7 location? 8 Α. Yes. 9 Did you personally use those Kenco Q. singles capsules? 10 11 Α. Yes. 12 How often did you use them? 0. 13 Α. Every day, seven times a day, at 14 least three times a day. 15 And you mentioned that you arrived in December '95, there already was a machine; 16 and did you start using it in December of 17 18 95? 19 Α. Yes. 20 And did you continue to use it Ο. 21 through August '96? 22 Α. Yes. 23 Let me ask the question first, and 24 wait if you would, please. 25 Did you ever see anyone else use the

Page 9 1 GLUS 2 Kenco singles capsules? 3 Α. Yes. 4 Q. Now I'm going to ask you to dig way 5 back, and I appreciate we're talking about December '95. But do you remember the 6 7 flavors of beverage that you used of the singles -- of the Kenco's singles cartridges 8 9 that you used? 10 Tea, medium roast. Those are the 11 two I used. Okay. And again, I understand it's 12 13 been a while, but can you describe the 14 appearance of the Kenco's singles cartridge 15 that you started to use in December of 1995? 16 Can I use my hands? 17 0. Yes. 18 It's about that long, about that 19 wide, square (indicating). I don't remember 20 if the top, the part that you inserted, was 21 more rounded or maybe came more to a point. 22 Each one had a different label on the front 23 for what the product was. 24 And do you remember what the bottom 25 looked like?

Page 10 1 GLUS The foil, but that's all I remember. 2 Α. 3 And recently, have you seen the Ο. Kenco's singles cartridge? 4 5 Yes. Α. 6 0. How recently? 7 Α. A month ago. And was there any difference in the 8 0. 9 appearance of what you saw a month ago from 10 what you --11 Α. To me they looked exactly the same. When you say "they," meaning what 12 0. 13 you started to use in December '95? 14 Α. Yes. 15 Now, with regard to the Kenco's 0. 16 singles cartridges that you were using from December 1995 to August 1996, in Rye Brook --17 18 we're going to separate the two times: 19 is Rye Brook and one is here in Park Avenue. 20 Were you under any obligation of 21 confidentiality or secrecy with anyone with 22 regard to the Kenco's singles cartridges? 23 Α. No. 24 0. To your knowledge were the other uses under any obligation of confidentiality 25

Page 11 1 GLUS 2 or secrecy to anyone with regard to the Kenco's singles cartridges? 3 4 No. Α. More specifically, were you under 5 6 any obligation of confidentiality or secrecy 7 to a company called Keurig, the inventor, 8 employees of Keurig? 9 Α. No. 10 Were you free to show the cartridges 11 to anyone you wanted to show them to? 12 Α. Yes. 13 Now, after August 1996, did you 0. 14 change companies that you worked for? 15 Yes, Mr. Camilleri was given a new Α. 16 position, senior vice president and chief 17 financial officer for Philip Morris 18 Companies, Inc., so we moved back to 120 19 Park. 20 And when you moved back -- when was 0. 21 that? 22 If I can look, August '96. Α. In August '96, when you arrived at 23 0. 24 120 Park Avenue, on the floor that you worked 25 on, was there a Kenco's singles machine?

Page 12 1 GLUS 2 No. Α. 3 Thereafter, was there a Kenco's 0. single machine? 4 Α. Yes. 6 0. Do you know how soon thereafter? 7 Α. Within months. Okay. And were you responsible for 8 Q. 9 ordering that machine? I was in the loop, but I believe it 10 11 was a phone call between my boss and I 12 believe Ronny Bell, but he told him that he 13 wanted a machine shipped here. And when the machine arrived, did 14 0. there also arrive Kenco's singles cartridges 15 16 for use in the machine? 17 Yes, there was an initial supply Α. 18 delivery. 19 0. Where was that machine located? 20 In the kitchen area on this floor. Α. 21 "This floor" being --Q. 22 The 22nd floor. Α. 23 The 22nd floor. That kitchen area, 0. 24 who had access to it? Everybody -- everybody. It's for 25 A.

Page 13 1 GLUS the purpose of the people on this floor, but 2 for everybody who came on the floor. 3 4 Q. That would be other employees of Kraft in the building -- excuse me, of 5 employers in the building? 6 7 Α. Yes. Q. Visitors to the building? 8 9 Α. Yes. 10 And I asked you about the machine, Q. 11 were there capsules, Kenco's singles 12 capsules, for use within that machine in the same location? 13 14 Α. Yes. 15 And were they out in public view? 0. Yes, they were in a storage kind of 16 Α. 17 view. 18 Okay. Now, in 1996, did you ever Q. 19 personally use the Kenco's singles capsules? 20 Α. Yes. Again, how often? 21 0. 22 Α. At least three times a day. In 1997, did you use the Kenco's 23 Q. singles capsules? 24 25 A. Yes.

Page 14 1 GLUS In 1998? 2 Q. 3 Α. Yes. And in 1999? 0. 4 5 Α. Yes. Now, did you ever see others use the 6 0. Kenco's singles cartridges in 1996? 7 Α. Yes. 8 In 1997? 9 0. 10 Α. Yes. 11 In 1998? 0. 12 Α. Yes. In 1999? 13 0. 14 Α. Yes. And can you -- and I know this is a 15 Q. difficult question, but can you remember 16 17 anybody that else that used them? All my coworkers on the floor at the 18 Α. time, definitely. Other people who would 19 come up for meetings, outsiders who came for 20 meetings. Everybody used it. 21 22 When you say "outsiders" that came Q. 23 to meetings, to your knowledge did any 24 visitors, non-Kraft employees, ever view and use the Kenco's singles machine? 25

Page 15 1 GLUS 2 Α. Yes. 3 Can you describe under which circumstances that might have happened? 4 5 Well, they would visit Mr. Α. 6 Camilleri. If you knew the layout of the 7 floor, Mr. Camilleri's office at the time was 8 by the kitchen, and his conference room was 9 opposite the kitchen. 10 So if people were there to meet with him and he wasn't available, I would say: Do you 11 12 want to go to conference room; would you like 13 coffee; we would go along the way. We had 14 such a variety, so you would ask them what 15 they want. 16 Now, we talked about each of the years '97, '98, '99, your personal use of the 17 Kenco's singles capsules, do you remember 18 19 what flavors you used? 20 I used medium roast or regular tea. Now, at any time in '96, '97, '98, 21 0. '99, were you under any obligation of 22 confidentiality or secrecy with regard to the 23 24 Kenco's singles cartridges and the use of 25 them?

Page 16 1 GLUS 2 A. No. 3 Did anyone ever say to you: Helen, you're free to use these cartridges, but you 4 can't tell anybody about the cartridges? 5 No. 6 Α. Were your coworkers under any 7 0. obligation of confidentiality or secrecy with 8 9 regard to the use of Kenco's singles? Α. 10 No. 11 This may seem obvious, but were you under any obligation of confidentiality or 12 13 secrecy with regard to the Kenco's singles cartridges -- did you have any obligation of 14 confidentiality or secrecy to Keurig? 15 16 Α. No. 17 Did you have any obligation of Q. confidentiality or secrecy to a Mr. Lazarus, 18 who is one of the inventors of the patent 19 20 suit? 21 Α. No. 22 What about to his co-inventor? 0. I don't know who these people are, 23 Α. 24 no. 25 But you didn't have any obligation Q.

Page 17 1 GLUS 2 of confidentiality or secrecy? 3 . A. No. Q. 4 Now did there come a time when you 5 were responsible for ordering the Kenco's singles cartridges for use in the machine on 6 7 the 22nd floor? 8 Α. Yes. Okay. Now did you keep a file with 9 Q. regard to those orders? 10 11 Α. Yes. And where did you keep that file? 12 Q. 13 Α. In my desk drawer. 14 Q. Did you provide copies of the documents in that file to Kraft's attorneys 15 16 in this case to be produced in this case? 17 Ά. Yes. 18 Okay. I'm going to show you some Q. 19 documents, if you would please hand this to 20 the court reporter. Now. 21 I don't know what the last defense 22 exhibit is in Banbury, but I know it was 23 certainly not up to 50. 24 So let's mark this defendant's exhibit 25 50.

Page 73 1 GLUS 2 capsule storage units in this particular 3 order? 4 I think it was just our own experience. We had an initial -- an initial 5 6 capsule storage unit and it wound up because there were so many varieties, it wasn't 7 enough. So we wound up getting a second, so 8 we just started them off with that. 9 Could you describe what the capsule 10 Q. 11 storage unit looks like? 12 Measurements, again, it's about yay Α. 13 high -- I can't explain it. It has little 14 slots and there was rows, and I don't know 15 how. 16 So you would say about two feet Ο. tall, a couple feed wide, something like 17 18 that? 19 I quess, close. Α. 20 0. And where was this capsule --21 Α. I'm supposed to wait till you 22 finish. 23 So in the 120 Park Avenue location, Ο. 24 your capsule storage unit, where was it 25 located?

Page 74 1 GLUS 2 Right next to the machine. Α. 3 So it was in the kitchen on the 22nd . 0. 4 floor of 120 Park Avenue? 5 Α. Correct. 6 0. Next to the brewer? 7 Α. Correct. 8 0. And if the Rye Brook location, also, 9 was it right next to the brewer? 10 Α. I believe so. 11 What does a box of Kenco's singles 0. 12 cartridges look like? 13 It's about that big, that wide, and Α. 14 for some reason I think the earl gray box was 15 white, I don't remember if they were all 16 white boxes or not, and inside were these 17 like vacuum-sealed bags, and within them were 18 the cartridges, and I don't remember how 19 many. 20 That was my next question was: 21 many cartridges were in a box? 22 Α. In a box, I don't know. 23 Q. Did it vary? Do you recall if it 24 varied between the different flavors, if 25 different flavors had a different number of

EXHIBIT C



<u>Fron:</u> LouisE Camilleri Telephone: (212) 878-2121 Telejas: (212) 997-5777

Date: November 6, 1996

<u>Tor</u> Mr. Dong Halliday

Company: Maxpax International

Kraft Jacobs Suchard

Fax Number: 011-44-1295-273152

Pages: 1 (including cover)

Message

Dear Mr. Halliday

I don't knew if Louis mentioned it in his phone call, but the mathine is a <u>B4G</u> success. So much so, that we re ready to re-toder certain items after such a short time. I'd appreciate if you could arrange for the following "favorites" to be sent to us at 120 Park:

Three (3) Boxes of Kenco Traditional Leaf Tea

Three (3) Hoxes of Kenco Medium Roast

Three (3) Bexes of Kenco Espresso

You've done so much for us already and I hate to bother you to place orders. If there's someone. I can do this with (on what appears will be a very regular basis), please just let me know.

Thanks and kind regards,

Meren



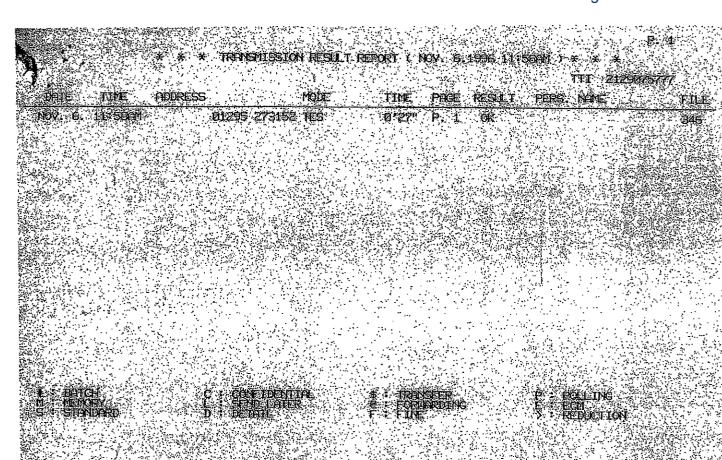


EXHIBIT D



Frant: Loais C Camilleri Telephone: (272)-878-7731 Lelefax: (212)-967-5777

Date: - February 4, 1997

To: Ms. Liz Maithews.

Company: Maxpax International

Fax Number: 44-1295-223540-

Tages: I (necholing cover)

Message

Dear Liz

It's that time again. May I place the following order.

- I Box Medium Roast /
- 2 Bezes Deck Roast 4
- 2 Boxes Trachional Leaf Tea 3
- 2 Boxes Hall Grey Tea + 3 -
- 3 Boxes Campuecine
- 2 Boxes Espresso 3
- 2 Boxes Carre Nor 1
- 2 Boxes Kronung 3

Since our choices are expanding, it would be great it we could get mother earsule storage unit

I was told it might be helpful for you to indicate on shipping documents the name and phone number of our broker, which is: Martin Strauss (717-723-7899).

One final, and very important thing, which Mr. Camilleri asked me to inquire about. How are we being billed for all this? We haven't seen anything on this end regarding the orders we've already placed.

As usual, thanks for all your help.

Kind regards.

K 0017219

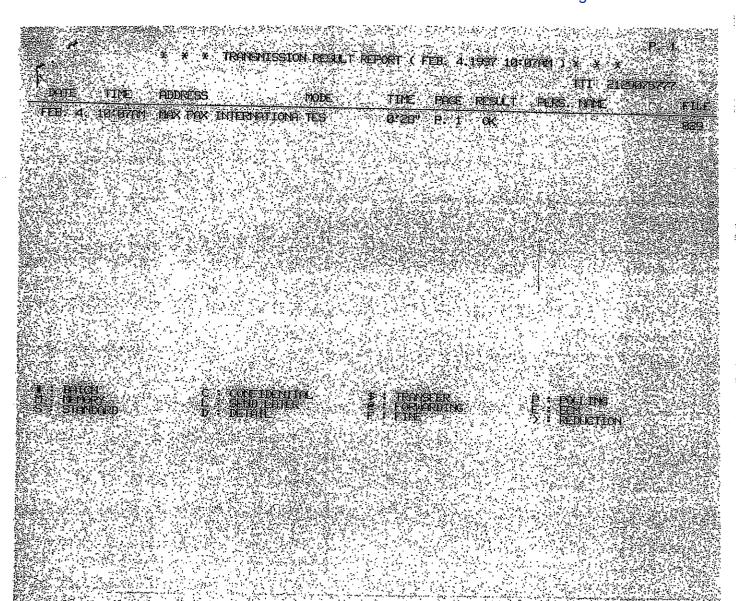


EXHIBIT E

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EXHIBIT F

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EXHIBIT G

EXHIBIT H

EXHIBIT I

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EXHIBIT M

EXHIBIT N

EXHIBIT O

EXHIBIT P

EXHIBIT Q